

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1157

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

-vs-

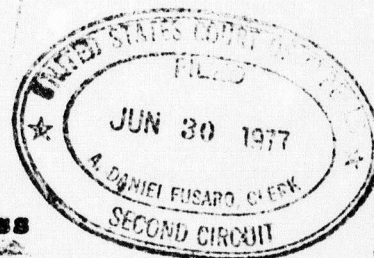
JAMES R. LORD, JR., et. al.,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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June 28, 1977

Chief Clerk
United States Court of Appeals
Foley Square
New York, New York 10007

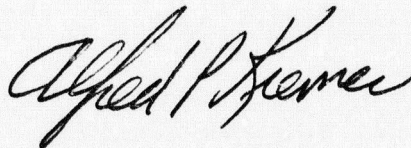
Re: U.S.A. -vs- James R. Lord
#77-157

Dear Sir:

Enclosed find eight (8) copies of James Lord's
appeal together with proof of service on the
United States Attorney.

A joint appendix for each of the appellants
has been prepared and will be submitted to
this court by appellant Schwartz's attorney
no later than June 30, 1977.

Very truly yours,



Alfred P. Kremer

Enclosures

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

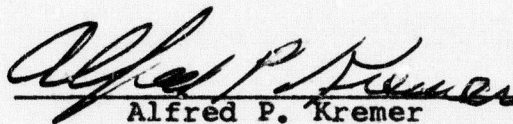
-vs-

AFFIDAVIT OF SERVICE

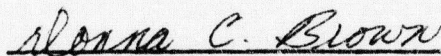
JAMES R. LORD, JR.,

Appellant.

The undersigned served upon the
United States Attorney, Gerald J. Houlihan, one copy
of the appellant, James R. Lord, Jr.'s brief on
June 28, 1977 at the United States Courthouse, 100
State Street, Rochester, New York.


Alfred P. Kremer

Sworn to before me this
28th day of June, 1977.



DONNA C. BROWN
Notary Public in the State of New York
MONROE COUNTY, N. Y. 78
Commission Expires March 20, 1978

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ISSUES PRESENTED

1. Was appellant Lord prejudiced, to the extent of being given the mistrial, by the prosecution's voir dire of the jury which revealed that unindicted co-conspirator Hook had been stabbed forty-seven times with an ice pick even though the government never permitted to get into testimony linking defendant Lord to that act?

Answer: The lower court held that no mistrial was necessary and that defendant Lord had not suffered any undue amount of prejudice.

2. Did Hook's testimony that defendant Lord was going to offer a false exculpatory statement so prejudiced Lord that a mistrial should have been granted after the jury heard this testimony?

Answer: The lower court held that no mistrial was necessary and that its instructions could clear the matter up.

3. Did Lord's ratification of the attempt to get Hook to leave town to avoid police interrogation so thoroughly prejudiced the jury against appellant Lord that a mistrial ought to have been granted?

Answer: The lower court held that no mistrial need be granted and that an instruction could cure this problem.

4. Did the lower court abuse discretion in failing to sever defendant Lord's case from defendant Schwartz?

Answer: The lower court held that it was perfectly proper to jointly try the three defendants together.

5. Did the lower court commit major error by failing to charge that the identification of appellant Lord was a factual question for the jury even though co-conspirator Hook had made an inquiry identification of appellant Lord?

Answer: The lower court held that it would not be an abusive discretion to refuse to make that charge.

6. Did the lower court commit error when it failed to voir dire the jury with respect to prejudicial trial publicity and with respect to possible misconduct on the part of a particular juror?

Answer: The lower court held that no misconduct had been committed.

7. Did the lower court commit error by refusing to strike the testimony of one of the F.B.I. special agents on the grounds that the agents' notes, upon which its Form 302 was prepared, were unavailable to the court?

Answer: The lower court held that it did not commit such an error.

8. Was the sentence of the lower court excessive?

Answer: The lower court held that its sentence was proper and did not constitute cruel and inhuman punishment.

F A C T S

Appellant James R. Lord, Jr., appeals from a judgment of the United States District Court in and for the Western District of New York. It was made by the Hon. John T. Elfvin, on March 22, 1977, sentencing the defendant, after a jury trial, which convicted him of armed bank robbery, in violation of 18 U.S.C. 2113 (A) (D) to a term of imprisonment for twenty years. Also from a judgment which sentenced him, consecutively, to a term of five years of incarceration based upon a conviction of conspiring to commit the above transaction all in violation of 18 U.S.C. 371.

The indictment charged defendant James R. Lord, Jr., Gerhardt J. Schwartz and Gerald Y. Yagy with the substantive crime of armed bank robbery and conspiracy to commit armed bank robbery in connection with a holdup of the Mt. Hope Branch of the Columbia Banking Savings & Loan Association in Rochester, New York, on April 9, 1976. The only prosecution witness

placing the defendants at the crime was a seventeen year old unindicted co-conspirator, Ronald Hook.

He testified that he was enlisted by defendant Yagy to participate in the bank robbery. Mr. Hook's role was to drive Mr. Lord and Mr. Schwartz to the bank and to wait for them to emerge with the money and then drive them to the place where the money was to be divided. Mr. Hook and each of the defendants was to receive a twenty-five percent share of the bank robbery proceeds.

Mr. Hook testified that he thought that Mr. Yagy's role consisted of furnishing a weapon for the bank robbery. It is undisputed that Mr. Yagy never entered the bank.

The only other proof linking any of the defendants to the robbery was the confession of Mr. Schwartz, Government's Exhibit 6A. Although the confession related only to the activities of Mr. Schwartz, it is the defendant's contention that since the court charged the jury that Mr. Yagy was not in the bank, at the

time of the robbery that it in effect corroborated the testimony of Mr. Hook and seriously implicated appellant Lord without his having any opportunity to cross-examine Mr. Schwartz.

The only other proof of the robbery was the testimony of the tellers and a bystander that the two bank robbers entering the bank wore gloves, stocking masks and coveralls to disguise their appearance.

Although the government attempted to prove that Mr. Hook, ultimately, was stabbed by Mr. Schwartz and Mr. Lord to silence him, as part of the continuing conspiracy to hide the original conspiracy, the proof fell far short of the government's hopes and the court finally declared that the conspiracy was closed on April 9, 1976. Prior to the court's closing the date of the conspiracy, the government, in its voir dire, made references to a stabbing of Ronald Hook. This was picked up by the newspapers and the trial court refused to conduct a separate voir dire with respect to the possible prejudice

to the defendants. The government got in proof of an alleged false exculpatory statement which Mr. Lord was going to prepare, proof of a conspiracy to have Mr. Hook leave town and proof of Mr. Schwartz's flight from Rochester, New York.

Also, the prosecution introduced evidence showing that Ronald Hook and defendant Yagy had an arrangement to split their winnings on a partnership basis and that after the robbery that Yagy took Hook gambling. The government on its summation made much of the fact that Yagy was a modern day Fagin leading astray this young man, Hook.

All of this was objected to and a mistrial motion made. Even though the court had warned the government well in advance of the trial that if it could not match up the stabbing with the bank robbery that a mistrial would be declared, it refused to grant the mistrial.

The question of the stabbing arose only at the voir dire and a mistrial motion was denied. The other evidence was stricken by the court and

an instruction given to the jury. Mr. Lord had previously moved for and was denied a severance from Mr. Schwartz. It was the defendant's contention that no amount of redaction could avoid the problems inherent when a co-defendant's confession is introduced into evidence. Although there was no mention of defendant Lord in it, the particular facts of this trial forced the jury to read Mr. Lord's presence between the lines of the confession.

Additionally, the presence of Mr. Schwartz further prejudiced defendant Lord by virtue of the ineffective assistance of Schwartz's counsel.

Counsel, even though he knew the substance of Special Agent Berry's testimony dealing with Schwartz's confession (because of the hearing held prior to trial) chose to cross-examine the special agent about the size of the raiding party that went to arrest Mr. Schwartz. Counsel dwelt on the illegal weapon which was seized by the F.B.I. together with the other illegal paraphernalia which Mr. Schwartz was carrying.

This did nothing to aid Schwartz's defense but merely showed what a terrible person he was. All of this rubbed off on defendant Lord seated approximately three feet from him at counsel table.

Additionally, although the issue had never been raised by the prosecution, defendant Schwartz introduced two doctors to testify that Mr. Schwartz had a problem with his back, all of which was suppose to give the jury the impression that Mr. Schwartz could not have robbed the bank. However, the government was able to successfully cross-examine the doctors who then testified that Mr. Schwartz would have had the physical ability to perform this particular bank robbery.

The court's attention was called to the fact that there may have been a problem with one of the jurors being accidentally contaminated by some third person. The court refused to conduct a voir dire with respect to this. Finally, at trial, defendant Lord moved for the production of Special Agent Berry's notes which served as

the basis of his F.B.I. report Form 302. Special Agent Berry indicated that these notes were no longer available as they had been destroyed.

The government introduced proof that Mr. Lord had made a statement to Agent VanZandt, on April 9, 1976, that he could not have committed the bank robbery as he was at his mother's bedside in a Rochester hospital. The government produced a nurse's aide from that hospital who testified that she did not see Mr. Lord there. Other than this, the government's case rested on the testimony of co-conspirator Hook. It is appellant's contention that the proof was by no means overwhelming that the errors complained of hereinafter were devastating and denied appellant a fair trial.

POINT I

PREJUDICIAL TESTIMONY
BY HOOK DENIED APPELLANT
LORD A FAIR TRIAL

It was the government's contention that Ronald Hook was stabbed by appellant Lord and Schwartz in order to prevent him from going to the police and informing on them. Additionally, the government attempted to prove that it was defendant Lord who, among others, attempted to encourage Ronald Hook to leave town. Additionally, Mr. Hook was permitted to testify about a false alibi which Mr. Lord allegedly had prepared for the trial (Mr. Lord did not testify at the trial or offer any proof). Finally, defendant Lord was prejudiced by the proof of partnership gambling between Yagy and Ronald Hook.

In order to accomplish this, the United States Attorney had indicated that he was going to prove that the conspiracy among the defendants remained in existence well beyond April 9, 1976, the date of the bank robbery, continuing into the end

of July, to include all of these events.

The court ruled that subject to mistrial so long as the United States Attorney could link up all of these items it would admit all of the evidence of the stabbing and these other incidents (Voir Dire p. 47; trial page 516).

A. THE STABBING TESTIMONY

The matter of the stabbing of Ronald Hook was always in front of the jury from the time the voir dire began. The United States Attorney brought the matter up when he stated to the jury:

One of the government witnesses in this case is a young man named Ronald Hook, and there was some publicity concerning Mr. Hook at one time as to the fact that he was stabbed some forty-five times.

(Voir Dire Transcript 2/8/77
p44f1)

The court at this time refused to grant a mistrial (p44) and permitted on the basis that there might have been pre-trial publicity and that

the jury ought to be voir dired with respect to this.

This was critical as one of the jurors, Mr. Cantenese remembered the stabbing (p49) and Mr. Gordon, another prospective juror, indicated that the stabbing would give credence to Mr. Hook's testimony (p51).

The court attempted to give an instruction to the jury indicating that they did not have to wash this out of their mind that if they could merely say that it would not matter that that would be sufficient (p101).

However, one of the jurors had an extended colloquy with the court saying that he could not put the stabbing out of his mind and he was therefore excused by the court. (p134-135).

The court refused to grant a mistrial at this point or at any other point (p160) concluding that the appellants had not been prejudiced.

The matter remained dormant until Mr. Hook's trial testimony when the court, outside the presence of the jury indicated that the stabbing would indeed

be a part of the proof for Counts 1 and 2 of the Indictment that it would be relevant and admissible proof bearing on the motivation and means for keeping Mr. Hook quiet (p516).

**B. THE FALSE EXCULPATORY
STATEMENT**

In order to get from the bank robbery to the events of the stabbing, the United States Attorney took Mr. Hook through other events, immediately after the bank robbery dealing with Mr. Lord. Specifically, Mr. Hook testified, that the next day, Saturday, he met Mr. Lord at a hospital. He then testified that Mr. Lord:

...told me that the police picked him up shortly after the bank robbery, and they couldn't get any information out of him, there was nothing for me to worry about. He said that he had a doctor saying that his toe was injured so badly he could barely walk that day, he had a cane with him.

(p488f18)

Defendant asked for a mistrial, the request was denied (p489) and the court failed to do anything more about it other than to admonish counsel that it would be possibly pertinent only as rebuttal.

Previously, Special Agent VanZandt had testified (p382, et. seq.) that he had a conversation with Mr. Lord. Mr. Lord had told him that he was visiting his mother at St. Mary's Hospital at the time of the bank robbery.

The prosecution produced a nurse at the hospital who testified, that to the best of her recollection that Mr. Lord had not been there on the morning of the bank robbery.

Agent VanZandt had testified that Mr. Lord had told him that he had stopped working for his past employer because of a heart condition and because he recently had had problems with one of his feet (p384f21).

Without the testimony of Hook, this statement would not have been harmful as Lord never took the stand and never produced any witnesses.

**C. PROOF THAT HOOK
WAS FORCED TO LEAVE TOWN**

On direct examination after testifying about the false exculpatory statement, the prosecutor then proceeded to have Mr. Hook testify about partnership gambling with Mr. Yagy and also testify that Mr. Schwartz had gone to b bank in Albany to change some of his share of the bank robbery proceeds for other money.

After continuous objection, the United States Attorney then, out of the absence of the jury, made an offer of proof that Mr. Hook would testify that Hook should get out of town because there was going to be a lot of pressure put on by the police and they didn't feel that Hook could take the pressure (p500).

Additionally, the offer of proof would show that Hook's mother did not want him to leave town and that it was imperative that Hook get out of town because of the pressure of the bank robbery.

All of this would be extremely prejudicial to defendant Lord if it got into the record and there were no basis for it.

The United States Attorney made a further offer of proof (p500-503) and he stated that Mr. Hook was going to testify that all of this testimony was going to link ^{with} the stabbing and that it should all be properly admitted.

The court, after hearing the offer of proof ruled that this could all be admissible (p516-519).

Mr. Hook was then brought back in to testify about these events and began to testify about the fact that he was in the presence of James Lord and Gerald Yagy when there was a conversation about pressure being put on Hook by the police.

Then the United States Attorney asked Mr. Hook if it was in connection with the bank robbery (p522f9) and Mr. Hook testified that it was not (p522f11).

Defendant Lord moved for a mistrial (p523) which was subsequently renewed (p713-746) and the court denied the motion for a mistrial (p781-782).

Significantly, the court went on to say that based upon Mr. Hook's statement that it would rule "that there is no evidence of any continuation of the conspiracy beyond April 9, 1976." (p794f21, et. seq.).

Although the court did in fact charge this, it was not enough. The stabbing was in the minds of the jury as it had been placed there several days earlier. There was proof that Mr. Lord was going to take the stand and lie and there was proof that Mr. Lord was then going to in some way try and get Mr. Hook out of town in order to keep the police pressure off of him.

The court's instructions gave an instruction with respect to the stabbing which was barely adequate (Voir Dire Transcript p99-100).

With respect to the testimony of the perjury about to be committed in the court room, the court merely gave an instruction to the jury to ignore it. (p489).

With respect to the testimony dealing with Hook's leaving town, the court at first did nothing (p519-520) and waited until much later to give a prefatory instruction that it was out of the case (p744).

The United States Attorney had control over his witness and knew what he was going to testify to.

It was incumbent upon him to have prepared Hook in such a fashion that these matters would not have been reached.

Once they were reached, the court should have granted a mistrial as the prejudice was massive and the court's instruction totally unsatisfactory. In U.S. v. Catalano, 491 F 2d 268, cert. den. 419 U.S. 825, 95 S. Ct. 42, L.Ed 2d 48 (1974) this court outlined certain tests when proof of prior criminal acts were being introduced into evidence. There, this court held that the prejudicial evidence was properly received because of the fact that the judge and the prosecutor had previously discussed this evidence and the jury had been given an instruction at the time of its receipt and was further charged with respect to the matter. All of this went to show the careful consideration given to the possibility of prejudice. (U.S. v. Catalano, 491 F 2d 268, 273-274).

In the instant case, there was proof of an assault, proof of attempted perjury and proof that there was going to be a hindering of the prosecution.

The court had little advance knowledge of this and gave inadequate instructions with respect to the receipt of the proof of the suborning of perjury and no instruction with respect to hindering the prosecution. Here, there was a clear abuse of discretion.

(Page 18 is omitted, next page is 19)

POINT II

THE COURT'S FAILURE
TO SEVER MR. LORD'S
CASE FROM DEFENDANT
SCHWARTZ WAS A SUB-
STANTIAL ABUSE OF
DISCRETION

On December 7, 1976, Mr. Lord moved to sever his case from defendant Schwartz's on the grounds that the confession which he had made seriously prejudiced Mr. Lord, if it were introduced. It was argued that the confession itself could not be successfully redeacted and that there would always be a way of linking Mr. Lord to the crime by the use of Schwartz's confession even though Mr. Lord's name was never mentioned. The Schwartz confession was six separate confessions. Two of them tied defendant Schwartz^{to} the armed bank robbery at the Columbia Bank; ^{two} to a robbery at a Rochester supermarket committed after the bank robbery; and ^{two} to confessing to the stabbing of Ronald Hook.

One of the paired confessions described the participation of the other participants in the various crimes.

A second confession was a redacted one inculcating only Mr. Schwartz. The initial motion to sever was denied on January 25, 1977 (p6-p8).

The court conducted a hearing on the voluntariness of the several confessions made by Mr. Schwartz and ruled (see transcript page 130-132) that each of them would be admissible against Schwartz.

At trial, the court held (p54lf18, et. seq.) that the government ^{could} only use Exhibit 6A consisting of the confession made by Schwartz about the armed bank robbery implicating only himself.

A close examination of this confession shows that it is replete with a staggering number of details which bolster co-conspirator Hook's statement.

Mr. Schwartz admits that he carried a 12 gauge shotgun loaded with two shotgun shells; wore green coveralls, pantyhose for a mask, and gloves. He removed cash and placed it in a pillowcase and thereafter left the bank in an

old model buick switching to another car two blocks from the bank. He admitted that during the bank robbery \$38,000.00 was taken.

Photographs of the bank robbery showed that one of the defendants was carrying a shotgun and the other a handgun. Mr. Hook testified to the use of an old model buick and the use of pillow-cases to carry the loot. Each and every one of the details went to establishing the truth of Mr. Hook's statements.

It was impossible to cross-examine defendant Schwartz on his statement as he never took the stand.

It is appellant's contention that even though the literal requirements of Bruton v. U.S., 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed. 2d 476 (1968) were met, that the spirit was breached.

Implicit in Bruton, supra, is the doctrine that a confession must only implicate one co-defendant and not another. The government made much of the confession of Schwartz on its closing referring to this juxtaposition of Schwartz's

statements with the events retold by Ronald Hook:

You have the confession of Schwartz, the confession telling his involvement in the bank robbery, the confession that I suggest to you coincides in numerous ways to Ronald Hook's testimony regarding Mr. Schwartz's involvement in this bank robbery. You recall the statement wasn't made until November 22, and Hook's statements were made earlier than that, and I think that this is pretty interesting.

(p853f18, et. seq.)

The court in charging the jury held that if the jury ruled that there was a conspiracy, and that Mr. Schwartz was a member of it and if it further decided that Mr. Yagy or appellant Lord were members of it:

...and if you decide on the basis of the admission, and otherwise, that Mr. Schwartz did what he says in the statement that he did do, then what he did do on April 9, 1976, could be usable against and charged against those other defendants who you found to be members at the same time.

(p933f18, et. seq.)

Appellant Lord asked for a clarification of this and the court attempted to deal with this at the conclusion of its charge by a further charge (p941).

It is a very fine point of law to be able to ask a juror not to use Mr. Schwartz's statement against the defendants but if they decide that Mr. Schwartz is a member of a conspiracy that his actions can be used against the members of it. Even to assume that this is a correct statement of the law, it requires such a fine distinction that it may be impossible for a juror to draw it.

In this case, the jury was not being asked to draw in the blanks of the name of the missing co-defendant, that they already have. What the jury was being invited to do in the instant case was to corroborate co-defendant Hook's statement. In U.S. v. Bozza, 365 F 2d 206 (CA 2 1966), this court decided that instructions themselves could not prevent people in a jury room from yielding "to the high irresistible temptation to fill in the blanks with the keys... provided (U.S. v. Bozza, *supra*, 365 F 2d 215).

It was impossible to cross-examine Mr. Schwartz. The court had previously charged:

Now, particularly, as to the defendant Yagy and Count 1, there has been testimony offered showing that he was not present at the savings and loan association at the time of the alleged robbery.

(p897f3, et. seq.)

In essence, Mr. Schwartz "took the stand" preventing Mr. Lord from cross-examining him. Although Schwartz named only himself, it was obvious that Mr. Lord had to be involved.

It is respectfully submitted that the testimony of Schwartz inculpated Lord and was vitally important to the government's case because of the fact that Hook was a co-conspirator who was deeply implicated in this scheme. The use of this confession was such a fundamental deprivation of Lord's Sixth Amendment rights that it is outside the usual rule of this circuit which would permit such evidence: see, U.S. v. Cassino, 467 F 2d 610 (CA 2 1972) cert. den. 410 U.S. 928, 93 S. Ct. 957, 35 L.Ed 2d 276 (1973).

Also, Schwartz's trial tactics prejudiced Mr. Lord. The government was caution to deal only with

facts occurring immediately after the arrest of Mr. Schwartz not involving itself in the substantial prejudice resulting from his arrest by a raiding party and the discovery of an illegal paraphernalia, and a weapon.

But , counsel exaggerated the facts of the arrest to make the defendant Schwartz an even more vicious human being in the eyes of the jury. He dwelt on the number of agents involved in the arrest (p696f7). The jury discovered that the door to Schwartz's apartment had to be pushed open and that agents had to enter with revolvers and shotguns exposed (p698). Mr. Schwartz, the jury learned, had a 38 caliber revolver in a case containing "several badges, some handcuffs and a pry bar." (p704f4).

All of this was unnecessary and seriously prejudiced defendant Lord's right to a fair trial.

Doctors Abello and Newton were called on behalf of the defendant Schwartz to testify that defendant Schwartz had a weak back and that

this would prevent him from being physically able to participate in a bank robbery.

The testimony backfired and the United States Attorney was able to prove that Mr. Schwartz was perfectly capable of robbing this bank.

These tactics were ^{an} act of madness in view of the fact that at trial Mr. Schwartz never took the stand to attack the confession in any way. It could only cement the guilt by association theme more firmly in the minds of the jury thereby preventing defendant Lord from receiving a fair trial.

Under Rule 14 of the Federal Rules of Criminal Procedure, the power to sever is discretionary and an appellate court will not reverse except where the failure to sever has been abused, U.S. v. Blitz, 533 F 2d 1329 (CA 2 1976).

Although the proof in a severed trial would be somewhat similar, based upon the testimony of co-conspirator Hook, there would be substantial

differences. Mr. Lord would not be exposed to Mr. Schwartz's confession, the testimony of Special Agent Berry and defendant's two doctors. There would not be a lethal spill over of Schwartz's confession into defendant Lord's case. Thus, there would be a difference of proof if the cases were severed and the proof would not be the same, see e.g. Graeco v. Meachum, 533 F 2d 713, 716 (CA 1 1975).

The instructions by the court were inadequate to separate the defendant and the Schwartz confession made it impossible to appraise the independent evidence of the acts of the defendant, see e.g. U.S. v. Campanale, 518 F 2d 352, 359 (CA 9 1975) cert. den. 423 U.S. 1050 (1976).

The spill over evidence was strengthened in the mind of the jury by all of these other matters and defendant was denied a fair trial by the court's failure to sever, U.S. v. Jenkins, 496 F 2d 57, 71 (CA 2 1974).

A motion for a mistrial was made (p713-714) based upon all of the above as well as other evidence. The prosecution had introduced evidence an identification photograph of Mr. Schwartz which was taken on his arrest. Also, there was much proof of Mr. Schwartz making statements to the F.B.I., at the time that he was arrested, that he was willing to plead guilty to the bank robbery. The court's instructions in this area were nonexistent. Defendant Lord was denied the right to confront Schwartz and all of this prejudiced Lord.

This is not the case similar to U.S. v. Rosenwasser, (Docket No. 76-1260, Opinion No. 205, decided 2/24/77). There, the prejudice to defendant Rosenwasser was not as massive or as cumulative as all of these matters were to defendant Lord.

The court committed a clear abuse of discretion in its failure to sever defendant Lord's case from Schwartz.

POINT III

OTHER ERRORS OF THE COURT DENIED THE DE- FENDANT OF DUE PROCESS

A. THE COURT'S PRO- CEDURAL RULING ON THE FORMATION OF THE CONSPIRACY

It is settled law that a trial court must make a procedural ruling when it determines that there is sufficient evidence to hold that a conspiracy has formed. However, it is defendant Lord's contention that the court's particular ruling (p461-462) was such that the case was taken from the jury. The court stated that:

...There has been a satisfactory showing from which, if you want to, you could determine that a conspiracy come (sic!!!) into being involving these four people for this purpose.

(p461f21)

The court stated that "I am not taking away this ultimate decision from you." (p461f18). However, while the judge may have been technically correct in his ruling, the net effect of it was

to take the case away from the jury and advise it that a conspiracy had been formed. The words procedural and substantive are words of art designed for attorneys and not laymen.

The court did not have to make this ruling in this fashion as it gave the jury the impression that the court had found that a conspiracy existed and confused the jury.

Such a ruling could have been made out of the presence of the jury and the court, on its charge could have merely charged the elements of conspiracy, as it did and let the matter go. If the government had never proven a conspiracy, an appropriate instruction could have been made at the conclusion of the government's case.

This ruling, having been made during Ronald Hook's testimony, may very well have given the jury the impression that the court was putting the seal of approval on Mr. Hook's testimony.

The jury always takes its cue from the court, and it cannot be said, beyond a reasonable doubt that the jury would not have been influenced by

the court's telling them a conspiracy had been formed.

B. THE COURT'S FAILURE
TO VOIR DIRE THE JURY
FOR PREJUDICIAL PUBLICITY

On February 12, 1977, at the conclusion of Ronald Hook's testimony, the Rochester Democrat & Chronicle printed an article on the first page of the second section entitled, "Robbery Case to Go to Jury." This article is annexed as Appendix D. It stated, among other things, that Mr. Ronald Hook was in the Federal Witness Protection Program after recovering from an assault July 16, 1976, in which he was stabbed forty-seven times with an ice pick (p528-532).

Unlike U.S.A. v. Catalano, supra, the court here did not make any attempt to see to it that the jury remained free of any prejudice.

The court was asked to voir dire the jury to find out if they had read it and to see what effect it had upon them.

The court (p533-535) ruled that it would do nothing further than what it had already done, that is to admonish the jury not to read anything about the incident in the paper.

In view of the fact that the stabbing was a critical matter which the government had gotten to the jury in the voir dire, the court should have at least asked the jury if they have read the article in order to find out whether there might be any possibility of prejudice.¹

This came at a time just before the jury was to get the case and consider it. The failure to determine if there was prejudice was erroneous on the part of the court.

C. THE COURT'S FAILURE TO
EXAMINE A JUROR FOR POSSIBLE
TAINT

Immediately before the charge, the court was advised that Mr. Lord's mother was witness to the fact that she believed that a Monroe County Assistant Public Defender had transported one of the jurors to the court room. She

1. Indeed, the court itself expressed misgivings as to whether the jury follows instructions not to read the paper (p798).

stated, through counsel, that that attorney and herself had had some unpleasant relationship in the past and that if in fact it were a juror and if in fact some conversation had taken place that her son might be prejudiced by this (p786-787). The court denied the request for a voir dire of a specific juror to see whether the situation did in fact take place holding that the contamination influence would be very remote and he declined to interrogate the juror.

Whether the contamination was nonexistent or remote will never be known because of the fact that the court did not take time to voir dire the jury and a specific juror to see if there was any possible contamination.

D. THE FAILURE TO
CHARGE EYEWITNESS
IDENTIFICATION
TESTIMONY

One of the threads running through the trial was the fact that the defendant, who was identified by Mr. Hook, was originally introduced

to him as Jimmy O'Brien. The defendant asked that the court charge the jury that they were to decide whether identification of James Russell Lord, Jr. had been satisfactorily resolved and that Jimmy O'Brien and James Russell Lord, Jr. were one in the same. The court refused to charge this (p944).

Although there was testimony at an identification hearing that defendant Lord had been identified by Mr. Hook, the issue was still open and the court should have given the charge.

E. THE FAILURE OF
AGENT BERRY TO
PRODUCE HIS NOTES

Special Agent Richard Berry testified as to his recollection of the events leading to Mr. Schwartz's confession at a hearing held prior to trial. His colleague, Special Agent Martineau was ill and was not present at the hearing.

The only testimony then, as to what Mr. Schwartz said and did was from one special agent. A demand was made for the handwritten notes which

he made which were subsequently incorporated into his 302 (p69). The agent testified that he did not have the notes and a motion was made to strike his direct testimony on the grounds that these notes were unavailable having been previously destroyed after the preparation of the Form 302. The court refused to grant the request (p70).

It is appellant's contention that his due process rights have been violated by not having these available in view of the fact that Agent Martineau was not present at the trial.

Production of these notes would have been extremely useful in determining what went into the preparation of the Form 302. It was impossible to cross-examine Martineau or Schwartz. Lord did not know what went into the Form 302.

In view of the importance of the confession to the government, the failure to have Martineau's notes available deprived Lord of due process.

POINT IV

THE SENTENCE WAS
EXCESSIVE

Since the maximum sentence is possible for a conviction of Armed Bank Robbery is twenty-five years, a sentence of twenty years is within the sentencing pereogative of the judge.

It has been uniformly held that the imposition of sentence is within the discretion of the sentencing court, if the sentence is within the statutory limit; U.S. v. Tucker, 404 U.S. 443 (1972); U.S. v. Balazquez, 482 F 2d 139 (2nd Cir. 1973).

It is respectfully submitted, however, that in the instant case the defendant received a sentence of twenty years plus five years and defendant Yagy received a sentence of ten years plus five years.

The court concluded that Mr. Yagy was a conspirator and that he aided and abetted the bank robbery that he should only receive a ten year sentence as a result.

The court fixed a greater penalty on Mr. Lord for entering the bank even though Mr. Yagy shared equally from the proceeds.

Mr. Yagy supplied the "wheelman" and for this consideration received a one-quarter share of the bank proceeds and also received a cut from Ronald Hook.

Although the court seemed to feel that Mr. Yagy's guilty participation was less than the others, his partners by no means felt so and accorded him an equal opportunity to share in the proceedings.

It is respectfully submitted that Mr. Yagy is equally is guilty as the others and that Mr. Lord's sentence should have equalled Mr. Yagy's.

There is no objective factor by which one judge can determine what sentence would be appropriate and the wide range of discretion in this case, although legal, is inequitable and unjust.

It is respectfully submitted that the same problem could be posed to each and every judge

in the United States for consideration and there would be by no means a certain result as to what the sentencing would result in.

POINT V.

THE JUDGMENT OF CONVICTION
SHOULD BE REVERSED, APPELLANT
LORD'S CASE SEVERED FROM
DEFENDANT SCHWARTZ AND A NEW
TRIAL ORDERED WITH A DIRECTION
TO THE TRIAL COURT TO LIMIT
THE TESTIMONY FROM MR. HOOK
WITH RESPECT TO THE EVENTS
OF THE CONSPIRACY AND ITS
DURATION.

Respectfully submitted,

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